STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 26, 2011
v	No. 295357 Oakland Circuit Court
MICHAEL DE'ANDRE RANSOM, Defendant-Appellant.	LC No. 2009-224634-FC

Before: CAVANAGH, P.J., and JANSEN and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b. He was sentenced as a fourth habitual offender, MCL 769.12, to consecutive prison terms of 8 to 40 years for the assault conviction and 2 years for the felony firearm conviction. Because the erroneous admission of defendant's prior conviction did not result in a miscarriage of justice, we affirm.

In early July 2008, acquaintances Johnny Wimbs and defendant engaged in an altercation over a cell phone. The cell phone matter apparently caused some bad feelings between the two that remained unresolved. Several days later, on July 6, 2008, defendant was at Christopher Henderson's home and Wimbs was at the home next door. According to defendant, Wimbs threatened and harassed him all day. At one point, Henderson went next door to address Wimbs and his issue with defendant. Defendant testified that he heard arguing next door and became concerned for Henderson's safety, so he took a gun from Henderson's home and went to the home. Defendant testified that he tried to get Henderson to leave, then went outside and was starting back toward Henderson's home when Wimbs came out onto the porch. Wimbs confronted defendant and, according to defendant, started quickly walking toward him with his hands in his pants. Defendant testified that he saw the handle of what he perceived to be a gun sticking out of Wimbs' pants. Defendant testified that Wimbs continued toward him and began pulling something out of his pants and that defendant pulled out the gun he had taken from Henderson's home and shot Wimbs in self–defense. Wimbs, on the other hand, denied threatening defendant. Wimbs also testified that he was not armed on the date of the incident, though emergency responders did, in fact, find a machete concealed in Wimbs' pants when they responded to location of the incident. Despite defendant's testimony, the jury ultimately convicted him of assault and felony-firearm.

On appeal, defendant asserts that the trial court abused its discretion in allowing the prosecution to impeach his credibility under MRE 609 with evidence of his prior conviction of unlawfully driving away an automobile (UDAA), MCL 750.413. While we agree that the trial court erred in admitting the challenged evidence, we conclude that the error was nonetheless harmless.

Defendant preserved this issue for appeal by timely moving to preclude the prosecution's use of his prior UDAA convictions for impeachment purposes. See, *People v Wells*, 102 Mich App 122, 125; 302 NW2d 196 (1980). We review a trial court's evidentiary decisions for an abuse of discretion. *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002). An abuse of discretion has occurred when the trial court's decision falls outside the range of principled outcomes. *People v Carnicom*, 272 Mich App 614, 616–617; 727 NW2d 399 (2006). Underlying questions of law are reviewed de novo. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

Prior to trial in this matter, the prosecution notified the trial court that if defendant decided to testify on his own behalf, it would seek to impeach his credibility with evidence of three prior UDAA convictions, all of which occurred in 2003. The trial court ruled that defendant's convictions "all involve an element of dishonesty," but that "it would be more prejudicial than probative if I allowed [the prosecution] to inquire of the [d]efendant if he had three convictions." The trial court thus ruled that the prosecution could impeach defendant with evidence of only one of his prior UDAA convictions.

MRE 609 allows for the impeachment of a witness's credibility through evidence of the witness's prior conviction under certain circumstances:

> (a) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and
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> (1) the crime contained an element of dishonesty or false statement, or
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> (2) the crime contained an element of theft, and
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> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
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> (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

In this matter, the trial court determined that defendant's prior UDAA convictions contained an element of dishonesty. However, as our Supreme Court has explained, "'dishonesty' is not demonstrated by a mere willingness to engage in criminal conduct." *People v Allen*, 429 Mich 558, 593 n 15; 420 NW2d 499 (1988). Instead, "the term refers specifically to lying deceit, misrepresentation or a lack of veracity." *Id.* The essential elements of UDAA are (1) possession of a vehicle, (2) driving the vehicle away, (3) that the act is done wilfully, and (4) the possession and driving away must be done without authority or permission. *People v Dutra*, 155 Mich App 681, 685; 400 NW2d 619 (1986). None of these essential elements relates to

lying, deceit, misrepresentation, or a lack of veracity. As such, UDAA clearly does not involve an element of dishonesty or false statement within the meaning of MRE 609 and may not be used to impeach a witness's credibility on that basis. This does not end our inquiry, however, because MRE 609 also permits impeachment by evidence of a prior conviction if the conviction contained an element of theft and was punishable by more than one year in prison. MRE 609(a)(2)(A).

Our Supreme Court has made clear that UDAA is not a theft offense. In *People v Hendricks*, 446 Mich 435, 448-449; 521 NW2d 546 (1994), our Supreme Court explained:

> UDAA, more commonly known as "joyriding," was enacted soon after the appearance of the automobile to protect against the unauthorized use of those vehicles. The statute was not aimed at preventing theft, because under such circumstances our larceny statutes would suffice. It was rather directed toward an annoying, but relatively harmless type of trespass . . . and it differs from larceny in that . . . it is not necessary that the State should establish in this type of case any specific intent to permanently deprive the owner of the possession of his property. [internal citation omitted].

According to the *Hendricks* Court, UDAA is a property offense that, while bearing some *relationship* to theft, requires no larcenous intent. *Id*. at 450. The UDAA statute was not aimed at preventing theft, because "under such circumstances our larceny statutes would suffice." *Id*. at 448. Thus, UDAA "lies within a hierarchy in line with, but below, the outer reaches of larceny." *Id*. at 450. Because UDAA does not contain an "element of theft" within the meaning of MRE 609(a)(2), evidence of a witness's prior UDAA conviction may not be used to impeach his or her credibility under MRE 609(a)(2). [1] The trial court therefore erred in permitting the prosecution to impeach defendant's credibility with one of his prior UDAA convictions.

That being said, it has been established that a preserved, nonconstitutional error, such as the one at bar, is not grounds for reversal unless the error resulted in a miscarriage of justice. The standard is derived from MCL 769.26, which provides, in part:

> No judgment or verdict shall be . . . reversed . . . in any criminal case, on the ground of . . . the improper admission . . . of evidence, . . . unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

In *People v Lukity*, 460 Mich 484, 493; 596 NW2d 607 (1999), our Supreme Court stated that MCL 769.26 creates a rebuttable presumption that a preserved, nonconstitutional error is harmless and places the burden on the defendant to demonstrate that the error actually resulted in

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[1] Though a panel of this Court may have previously found that UDAA contained an element of theft, *People v Dixon*, 175 Mich App 472, 477; 438 NW2d 303 (1989), we are not bound by that decision due to its publication date. MCR 7.215(J)(1).

a miscarriage of justice. Under this standard, the defendant has the burden of establishing that it is more probable than not that the error in question "undermine[d] the reliability of the verdict," *People v Blackmon*, 280 Mich App 253, 270; 761 NW2d 172 (2008). In determining whether an error resulted in a miscarriage of justice, the reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001).

Here, defendant has not established that the erroneous admission of his prior UDAA conviction undermined the reliability of the verdict. While we recognize that because there were only two witnesses to the crime, defendant and Wimbs, and that the case was thus essentially a credibility contest between the two, we nonetheless find several compelling reasons to hold that no miscarriage of justice occurred.

First, defendant did not expressly contend that the erroneous admission of his UDAA conviction resulted in a miscarriage of justice. Instead, defendant focuses his argument solely upon whether the trial court engaged in the appropriate analysis in determining whether the conviction was admissible, and then merely noted that the potential existed for the jurors to use the prior conviction as character or propensity evidence.

Second, the offense with which defendant was charged, assault, and UDAA are highly dissimilar. Had the prior conviction been assaultive in nature, a likely impact on defendant's credibility and, perhaps the outcome of the trial could be reasonably argued. However, that defendant was previously convicted of "joyriding" does not carry with it an inference that defendant must therefore be dishonest about whether he shot Wimbs in self-defense.

Third, the evidence concerning defendant's UDAA conviction appeared in a single question posed by the prosecution:

Q: You were convicted for unlawfully driving away in an automobile; is that correct?

A: Yes.

The prosecution then immediately redirected his questions to the incident giving rise to defendant's charge of assault. The information was not repeated or emphasized during the course of the trial, and the prosecution did not reference defendant's UDAA conviction during closing argument. In this case, we find it highly unlikely that the jury convicted defendant because of the single, fleeting reference to a prior UDAA conviction as opposed to the remaining evidence. Defendant has not shown that the isolated reference to his UDAA conviction had a prejudicial effect to the extent that, absent the statement, the outcome of his trial would have been different.

Fourth, defendant was not the only witness impeached with a prior conviction under MRE 609. Testimony elicited at trial established that Wimbs, too, had a prior UDAA conviction. While two erroneous admissions used to impeach opposing witnesses do not cancel each other out any more than two wrongs make a right, it is difficult to conclude that defendant's UDAA conviction had a more substantial effect on his credibility than did Wimbs' conviction for the exact same offense. Because the credibility of these two witnesses was squarely at issue, it can be presumed that the UDAA convictions either impacted the credibility of both Wimbs and

defendant, or neither. It is highly unlikely that the jury would find Wimbs credible *despite* his UDAA conviction, and find the defendant not credible *because of* the same conviction. Moreover, the prosecution followed up on his question to Wimbs regarding his UDAA conviction by stating, "you [] basically stole an automobile; is that correct?" then again referenced that Wimbs was a convicted felon in his closing argument. Thus, more emphasis was arguably placed upon Wimbs' UDAA conviction.

Finally, there was other evidence concerning defendant's credibility and ultimate guilt even without the evidence concerning his prior UDAA conviction. While defendant testified that he ignored Wimbs' threats to him prior to the incident, at least one witness testified that defendant was making threats toward Wimbs just a short time prior to the shooting. And, defendant admittedly went over to Wimbs' location, grabbing a gun to take with him. Further, while defendant testified that he thought Wimbs was reaching for something in his pants, defendant never saw Wimbs actually pull anything out of his pants; weapon or otherwise. Defendant simply pulled out a gun and fired several times at Wimbs. Absent the challenged evidence, then, the jury had other evidence before it that would allow a logical conclusion that defendant was the aggressor rather than acting in self defense.

On the record as a whole, defendant has not demonstrated that "it is more probable than not that the alleged error affected the outcome of the trial in light of the weight of the properly admitted evidence." *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003). Reversal is thus not warranted.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto